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a suit on a note by motion and notice, a notice alleging a cause of action by the holder against the indorser, which fails to show that the note was protested or notice of dishonor given, does not state a cause of action.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1494-1502; Dec. Dig. § 469.* 10 Va.-W. Va. Enc. Dig. 128.]

3. Bills and Notes (§ 422*)—Waiver of Protest.—A medical company by its proper officers executed a note payable at a bank. The payee, a loan company, then indorsed the note in blank. The president of the medical company was also president of the loan company. The note was not presented at the bank at maturity; but three days after maturity the note was presented to the president of the loan company, and he wrote on the note, "The medical company is indebted to the loan company," and returned the note. Held, that a contention that since the president acted for both companies, and placed his refusal to pay on the ground of an indebtedness by the maker to the indorser, it was a waiver of release of the indorser by failure of the holder to present at maturity, could not be sustained, where there was no showing that the president was the proper person to whom to present the note, or that he had any authority to waive the nonliability of the indorser caused by the failure to present.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 422.* 2 Va.-W. Va. Enc. Dig. 459.]

4. Bills and Notes (§ 422*)—Release of Indorser—Waiver of Rights.—A waiver of legal rights will not be implied, except on clear and unmistakable proof of an intention to waive such rights.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 422.* 13 Va.-W. Va. Enc. Dig. 637.]

Error to Law and Chancery Court of City of Norfolk.

Action by John Fields, Jr., against the Security Loan & Trust Company. From a judgment for plaintiff, defendant brings error. Reversed.

Jeffries, Wolcott, Wolcott & Lankford, for plaintiff in error.

Thos. W. Shelton, for defendant in error.

DIX v. COMMONWEALTH.

March 10, 1910.

[67 S. E. 344.]

1. Intoxicating Liquors (§ 215*)—Prosecution—Indictment—Sufficiency.—An indictment alleging that accused, within six months last past, in a certain magisterial district in the county, unlawfully sold

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

and delivered intoxicating liquors and mixtures thereof, against the peace, etc., notified accused of the charge against him, and was sufficient.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 258-260; Dec. Dig. § 215.* 7 Va.-W. Va. Enc. Dig. 430, 406; 8 id. 24.]

2. Criminal Law (§ 678*)—Election between Acts—Discretion of Trial Court.—Where, in a prosecution for unlawfully selling intoxicating liquors, the court, at the conclusion of the commonwealth's evidence, required it to specify the sale for which it sought a conviction, and accused was convicted upon the specific offense indicated by the prosecuting attorney, the discretion vested in the trial court in such cases was properly exercised.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.* 8 Va.-W. Va. Enc. Dig. 30; 14 id. 586. Indictment and Information, Cent. Dig. §§ 425-437.]

3. Criminal Law (§ 1141*)—Appeal—Review of Sufficiency of Evidence—Consideration as on Demurrer.—On review on writ of error of a judgment of conviction for unlawfully selling intoxicating liquors, a contention that the evidence is insufficient to support the verdict is considered as upon a demurrer to the evidence.

[Ed. Note.—For other cases, see Criminal Law Cent. Dig. § 3014; Dec. Dig. § 1141.* 1 Va.-W. Va. Enc. Dig. 620; 14 id. 102.]

4. Criminal Law (§ 939*)—New Trial—Grounds—Newly-Discovered Evidence.—Where, though alleged newly-discovered evidence was known to the accused during the trial, he did not ask for delay or process to procure the witness who would testify to such evidence, a new trial for the purpose of procuring such evidence was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318, 2320; Dec. Dig. § 939.* 10 Va.-W. Va. Enc. Dig. 448; 14 id. 780.]

Error to Circuit Court, Lancaster County.

Frank Dix was convicted of unlawfully selling intoxicating liquors, and he brings error. Affirmed.

W. B. Sanders and T. J. Downing, for plaintiff in error.

The Attorney General, for the Commonwealth.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Note.—See annotation to *Clopton v. Com.* (63 S. E. 1022) reported in 15 Va. Law Reg. 132.